U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 February 2004

CASE NO.: 2003-LHC-786

OWCP NO.: 07-164755

IN THE MATTER OF:

KENNETH E. BLAKE,
Claimant

v.

LAKE CHARLES STEVEDORES, INC.,
Employer (Self-insured)

APPEARANCES:

Jere Jay Bice, Esq.,
On behalf of Claimant

Scott A. Soule, Esq.,
On behalf of Employer (Self-insured)

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.* (2001) brought by Kenneth Blake (Claimant) against Lake Charles Stevedoring, Inc. (Employer [Self-insured]). The issues raised by the parties could not be resolved administratively,

and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on August 25, 2003, in Metairie, Louisiana.

At the hearing both parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. [1] Claimant testified, called Nancy Favaloro, Employer's vocational expert, as an adverse witness and introduced 28 exhibits, which were admitted, including: medical records from Christus St. Patrick Hospital, Lake Charles Memorial Hospital, Advanced Rehab Services, and Drs. Nabours, Perry, Odenheimer and Bernauer; chart of medical expenses; Claimant's personnel file and wage records with Employer; depositions of Dr. Perry, Tom Biven and Cathy Manuel; as well as various Department of Labor filings.[2] Employer called Nancy Favaloro and Steve Arceneaux, and introduced 15 exhibits, which were admitted, including: various Department of Labor filings; medical records of Lake Charles Memorial Hospital and Drs. Nabours, Perry and Gunderson; Claimant's Choice of Physician Form; Employer's wage records; Depositions of Claimant and Dr. Perry; vocational rehabilitation reports; Claimant's answers to interrogatories; and various correspondences between the parties.

Post-hearing briefs were filed by the parties.[3] Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__.

[2] Employer objected to the admission of CX-24, a record from Dr. Bernauer dated August 11, 2003, on the basis that they did not receive it until the eve of trial and to admit it would be prejudicial to Employer's case. I have admitted the exhibit with the understanding Employer's case at hearing may be negatively affected. I left the case open to allow the parties to conduct any post-hearing discovery they felt necessary regarding this exhibit, with the goal of avoiding a second hearing for modification.

[3] Claimant submitted a 28-page, double spaced brief on October 27, 2003. Employer submitted a 30-page, double spaced brief on October 27, 2003.

1. An accident occurred on August 9, 2002;

2. Claimant's injury was in the course and scope of his employment;

3. An employer-employee relationship existed at the time of Claimant's accident;

4. Employer was advised of the accident on August 23, 2002;

5. Employer filed Notices of Controversion on August 28, October 21, November 4 and December 16, 2002;

6. An informal conference was held on December 12, 2002;

7. Claimant's average weekly wage at the time of injury was $573.38; and

8. Employer paid Claimant temporary total disability benefits from August 24, 2002, until October 16, 2002, in the amount of $2,948.78 and permanent partial disability benefits from October 17, 2002, until February 15, 2003, in the amount of $3,524.93.

II. ISSUES

The following unresolved issues were presented by the parties:

1. The nature and extent of Claimant's disability;

2. Choice of physician;

3. Date Claimant reached maximum medical improvement;

4. Employer's liability for unpaid medical bills; and

5. Attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant, a 45-year old male, worked as a longshoreman for Employer for almost 30 years. On Friday, August 9, 2002, he slipped on some dried peas while helping a co-worker move a bucket. Claimant's left shoulder hit the deck, while his right hand remained on top of the bucket. The dispatcher and his supervisor were not on the vessel that night, and because Claimant did not feel hurt he continued to work. Claimant reported his injury to Tom Biven, the office manager, on August 23, 2002. Claimant signed a Choice of Physician form which had Dr. Carl Nabours' name printed on it; Claimant saw Dr. Nabours that same day, complaining of pain in his back, neck, shoulder, right foot, and right hand. Dr. Nabours took x-rays of Claimant's back, which revealed mild scoliosis in the thoracic spine. He referred Claimant to Dr. Perry, an orthopedic surgeon, on August 26, 2002.

Claimant first saw Dr. Perry on September 4, 2002. He presented with pain in his neck, bilateral shoulders, and right hand. Dr. Perry reviewed the x-rays, which showed mild degenerative disc disease of the cervical spine; there were no positive findings in the thoracic or lumbar spine. Dr. Perry placed Claimant on light duty and recommended physical therapy. Claimant returned for a follow-up on September 19, 2002, complaining of mostly neck pain; Dr. Perry ordered a cervical MRI, taken on September 28, which revealed disc desiccation at the C2-3, C3-4, C4-5, C5-6 levels with a disc herniation at C5-6. On September 30, 2002, at Claimant's follow-up appointment, Dr. Perry diagnosed Claimant with degenerative disc disease, cervical herniated nucleus pulposus, and a lumbar strain. He continued to recommend physical therapy and suggested steroid injections to relieve Claimant's pain; Dr. Perry removed Claimant from work until October 17, 2002. On that date, Claimant returned for a follow-up with Dr. Perry, complaining of neck and scapular pain, as well as numbness and tingling in his right index finger. Again, Dr. Perry recommended steroid injections which Claimant refused. Because Claimant refused the injections, and Dr. Perry did not want to perform surgery, he reported on October 25, 2002, that Claimant had exhausted his abilities to treat him and Employer could assume Claimant was at MMI as of October 17, 2002. He suggested Claimant seek an opinion elsewhere.

On October 27, 2002, Claimant was admitted to the Christus St. Patrick Hospital emergency department with complaints of pain and numbness in his head and neck. Dr. Hathaway diagnosed Claimant with neck pain, prescribed pain

medication and referred him to Dr. Odenheimer, a neurologist. On October 30, 2002, Claimant presented to Dr. Odenheimer with bilateral shoulder pain affecting his right scapula, and mid and low back pain. Claimant also complained of headaches, sensory disturbances in his left face and neck, right upper quadrant pain and right hand and foot pain. Dr. Odenheimer reviewed the September 28 cervical MRI, which showed spondylitic changes, disc disease and spinal stenosis. He diagnosed Claimant with a cervical strain, disc disease, muscle spasm, as well as neck, back and bilateral shoulder pain. At his November 26, 2002 follow-up appointment, Claimant continued to complain of significant neck and shoulder pain; Dr. Odenheimer referred him to Dr. Bernauer. Dr. Odenheimer performed an EMG of Claimant's upper extremities on December 17, 2002, finding right C5 and C6 radiculopathies, mild right carpal tunnel syndrome and left C5 radiculopathy.

On December 2, 2002, Claimant saw Dr. Bernauer, an orthopedic surgeon, for complaints of moderate low back pain, severe neck pain, bilateral shoulder pain, right arm pain, and numbness and tingling in the right foot. Dr. Bernauer found Claimant had decreased motion in his neck and back; x-rays showed narrowing at the C4-5 and C5-6 levels; and Dr. Bernauer interpreted the September 28 MRI to show disc herniations at the C4-5 and C5-6 levels. Lumbar and thoracic MRIs performed on January 14, 2003, revealed a disc bulge with slight protrusion at L4-5, a disc bulge at L5-S1, and disc herniations at T5-6, C5-6 and C6-7. Dr. Bernauer recommended an anterior cervical diskectomy and fusion. At Claimant's March 12, 2003 follow-up, he continued to complain of neck popping, headaches and shoulder pain. On April 9, 2003, he presented with neck pain and trigger points in the left shoulder and thoracic spine. Dr. Bernauer recommended pain management. Claimant continued to complain of thoracic back pain on July 21, 2003, although his neck pain had improved; he had not been to pain management because his carrier did not approve it. On August 11, 2003, Dr. Bernauer stated Claimant was totally disabled and could not undergo an FCE until he received the recommended treatment. Claimant has not worked since August 23, 2002.

B. Claimant's Testimony

Claimant is a 46-year old male, born on November 3, 1957, who has lived in Lake Charles, Louisiana, for the past 12 to 14 years. (Tr. 105-106). Claimant testified he has worked at the Port of Lake Charles for almost 30 years, since November, 1974. Claimant lied about his age so that he could be hired as a part-time employee until he finished high school in 1976; after graduation he continued to work at the Port. (Tr. 106-107). On cross-examination, Claimant stated he was

on medication at the hearing, but understood the questions asked of him and answered truthfully. (Tr. 143).

Claimant has held positions with Employer, including forklift operator, container foreman, and gear man. Over the years he gained seniority, and when he left he was number 46 out of almost 300 employees. Claimant testified he has not held jobs outside of Longshore, except for a short job with a carwash before high school. (Tr. 107-109). He never worked as an auto mechanic, although he stated he would help his friends out by changing their oil, changing flat tires or tuning up their cars here and there; he never got involved with internal components of an automobile engine. However, Claimant then testified he has overhauled one car engine. (Tr. 108-109).

Claimant testified he suffered an accident at work on August 9, 2002. That night, Claimant was flag foreman while the crew loaded a bulk terminal ship. They were short-handed and at the request of John Baker, Claimant helped him move a bucket which had a hairline leak. Claimant testified that while moving the bucket he slipped on some dried peas which they were loading onto the vessel and hit his left shoulder on the deck. His right hand was on top of the bucket and did not hit the deck, although it could have slipped off of the bucket for a second. Claimant testified John Baker and Ron Sisson both witnessed the accident. He did not report the accident right away. On cross-examination he testified employees must report accidents within 30 days, depending on the extent of the injury. (Tr. 109-110, 144, 147-148, 153).

Claimant's accident occurred on a Friday night and his supervisor, Ernie Langley, and office manager, Tom Biven, were not on the ship. Claimant did not feel he was hurt, therefore he continued to work and did not report the accident. However, on cross-examination, he stated he had other minor injuries in the past which he reported immediately, even though he was not injured. Claimant finished his shift and continued to work for about two weeks, thinking the pain would go away. In fact, the pain only worsened and he reported the accident on August 23, 2002. That day, Claimant informed Langley he needed to report his accident from "the other night."[4] Langley instructed Claimant to "see Tom [Biven]." (Tr. 110-113, 116, 153).

Claimant testified he told Biven about his accident and asked to see a medical doctor. He stated Employer's policy is for injured employees to fill out a

[4] For brevity, parties will be referred to by their last names only.

choice of physician form with Dr. Nabours' name pre-printed on it; Claimant had seen Dr. Nabours in the past for other work injuries.[5] Since he needed medical treatment, he did not feel like arguing, Claimant signed the form. (Tr. 113). He testified Biven did not tell him he had a choice of physicians. Claimant never saw Dr. Nabours on his own, as his own doctor. He saw Dr. Nabours only three or four times in his life and once or twice for his current injury. (Tr. 117-118).

On cross-examination, Claimant acknowledged the form he signed indicated he had a choice of physician. He also acknowledged that Employer's secretary, Cathy Manuel, typed a number of forms for him to look at and sign; she handed the forms to him one at a time, as she finished preparing them. (Tr. 155). However, he was feeling so bad at the time that he does not remember actually reading the forms; Claimant did not think much of this because Employer always sent him to Dr. Nabours. He did mention to Manuel that he thought Biven was up to something, and that there must be some kind of trick. (Tr. 156). Claimant then testified if the choice of physician form had been blank, he would not know who to put down; he was not sick very often and did not have a general practitioner. Additionally, he knew Dr. Nabours was only the first doctor he saw when injured. (Tr. 157-158). Claimant did not have a problem going to see Dr. Nabours, and no one forced him to sign the choice of physician form; however, he testified Biven stormed out of the office as if to say "get him to sign this paper." (Tr. 158). Claimant also stated in 1998, when he injured his foot, he initially saw Dr. Nabours, but Employer approved his visit to another doctor who he chose himself. (Tr. 160, 166).

Claimant testified Dr. Nabours referred him to Dr. Perry at the Center for Orthopedics. Claimant did not select Dr. Perry, but saw him because he needed treatment. When he saw Dr. Perry, Claimant was having problems with his neck and back, although he felt his August 9, 2002 injury aggravated previous injuries in his right foot and right hand, and he also had pain in both shoulders. Claimant clarified that his foot and hand injuries are not part of his present claim; only his back, neck and shoulder injuries are at issue. (Tr. 149-152). Claimant testified he saw Dr. Perry approximately three times and did not feel comfortable with him. (Tr. 118-120). On cross-examination, Claimant testified he did not provide Dr.

[5] Claimant testified his prior work injuries include a right finger fracture in 2001, a right foot fracture in 1998 and a back strain in 1991; on each occasion Employer sent him to see Dr. Nabours. (Tr. 114-117). He testified he also flipped over in a forklift in 1988 and injured his neck, back and shoulder, but did not remember a work accident in which a hook swung down and hit him on his neck and right side. Claimant stated he did not miss any work over these accidents; he did not remember them at his deposition. (Tr. 177, 182-183, 185-187, 218-219).

Perry with his history of back or neck problems, but the following day he told his physical therapist about his 1991 thoracic muscle strain. Claimant explained he withheld this information from Dr. Perry because he was not to be trusted, and he may not have remembered the information during the visit. (Tr. 169-170).

As part of Claimant's treatment, Dr. Perry ordered an MRI and recommended steroid injections into Claimant's neck and shoulder, which he refused. On cross-examination, Claimant explained he did not want steroid injections because he did not like taking steroids; similar injections only helped his foot and finger injuries temporarily. At his deposition, Claimant also stated he did not want the injections because he does not like needles, and he did not like the side-effects he experienced with his prior injections, in particular hair loss. (Tr. 121, 188-189; EX-9, p. 52). Claimant testified Dr. Perry suggested he seek another opinion, but Claimant could not get Employer's approval to see another doctor; Claimant ended up in the emergency room at St. Patrick's Hospital on October 27, 2002.[6] (Tr. 121).

While in the emergency room, Claimant was treated by Dr. Hathaway who referred him to Dr. Odenheimer, a neurologist. Dr. Odenheimer did not say anything about Claimant being able to work because he was just trying to run tests. Claimant testified Dr. Odenheimer performed an EMG and prescribed him Elavil,[7] which may have been steroids. Dr. Odenheimer then referred Claimant to Dr. Bernauer. (Tr. 122-123). Claimant first saw Dr. Bernauer on or about December 2, 2002. (Tr. 124). At each of their appointments, Dr. Bernauer gave Claimant a slip excusing him from work until the next visit; the most recent visit was July 21, 2003. (Tr. 126-127). Dr. Bernauer also ordered MRIs and recommended surgery for Claimant's back. Claimant was skeptical about surgery, and after some discussions he and Dr. Bernauer decided on the more conservative path of pain management. This treatment has not yet been authorized. While under Dr. Bernauer's care, Claimant's back and neck improved somewhat, but they still cause him pain. With the proper treatment and care Claimant thinks he can improve to 100% and resume working on the docks. (Tr. 127-130). The pain medications prescribed by Dr. Bernauer are helping, although he is still limited in what he can do. (Tr. 131). Claimant testified his condition has not gotten any worse since Dr. Perry released him on October 17, 2002. (Tr. 206-207).

[6] Claimant decided to use his insurance for his subsequent medical treatment because Employer denied his requests for said treatment. (Tr. 122-123).

[7] Claimant based his testimony about his medical treatments on CX-28, his pharmacy's list of medications prescribed to him throughout this injury. (Tr. 124-125).

When Claimant received Ms. Favaloro's labor market survey, he made an effort to see if some of the jobs were available to him; specifically he went to Don's Carwash in Lake Charles to inquire about a service manager position. He spoke with Karen DiGiglia who told him the position paid $22,000-$25,000 per year, or about $6.00 per hour. Claimant's notes of the visit indicate the job description was "no sitting, thirty minutes lunch break; if busy, no breaks at all; if short-handed, all duties are performed as needed; six dollars per hour; depends on weather, the weather now; hours are not guaranteed; in the future, straight commission . . ." Claimant would also be required to stand on concrete all day. Ms. DiGiglia told Claimant there was no position available, but Claimant filled out an application. He was not hired. (Tr. 131-136, 139).

Claimant also spoke with Bobby Jo Terez in the Office of Motor Vehicles about a position as a motor vehicle analyst. He was not eligible for the position because he had no experience in law enforcement. (Tr. 136-137). Claimant then went to Isle of Capri Casino to inquire about job availability; however, they were not hiring; there were no openings for an attendant, security guard or a shuttle bus driver. Claimant testified there may have been one opening, but it required a physical and training. He did not fill out an application at Isle of Capri because the lady he spoke with said they probably would not hire him in his condition. (Tr. 138-139).

Claimant testified he went to Walgreens Pharmacy in Lake Charles, and spoke to Keith Girlinghouse, the manager, about a job in the photo lab. Claimant did not apply for the job because Mr. Girlinghouse indicated he would not be hired in his current physical condition; the job's requirements exceeded Claimant's capabilities. Specifically, Mr. Girlinghouse said the lifting would be up to 50 pounds when unloading the supplies; the job was not light duty. (Tr. 140-142). However, on cross-examination, Claimant testified despite his belief he could not perform this work, when he gets better he wants to return to the docks lifting up to 100 pounds. (Tr. 215).

When Claimant went to these employers to inquire about job openings, he brought with him the doctor restrictions from Dr. Perry and Dr. Bernauer. (Tr. 140). On cross-examination, Claimant stated he did not give the employers a start date because he was under doctor's care. He testified he did not intend to get a job at any place where he filled out an application. (Tr. 211-214).

On cross-examination, Claimant testified he understands the purpose a Functional Capacity Evaluation is "probably to see how much you can do, or whatever, and stuff like this." He stated that in his current condition he does not think he can take any test without first receiving the medical treatment recommended by Dr. Bernauer. Claimant also testified he wants to return to work at the docks when he gets better. However, Claimant testified Dr. Bernauer has only told him "we're going to try to get you back to work." Claimant testified that with his seniority, he would not have to return to slinging 100-pound bags of rice. (Tr. 190-192). With his seniority, Claimant has a choice in what work he performs, but does not know when he will be called upon to do heavy work. Because he works through a union, he does not go to work if it is too heavy for his physical capabilities. (Tr. 201-203).

C. Testimony of Nancy T. Favaloro

Ms. Favaloro is a vocational rehabilitation counselor retained by Employer; she was tendered and accepted by the Court as an expert in the field of rehabilitation counseling. (Tr. 39, 79). Although Favaloro did not have an opportunity to meet with Claimant, she did review his file and deposition. She testified Claimant's deposition was fairly comprehensive regarding his work history and education background; the only thing she would have done if she met with him is administer vocational tests. (Tr. 43). She understood Claimant performed general Longshore duties, but also worked as a forklift operator and a foreman, flagged, and operated other equipment. On May 21, 2003, Employer asked Favaloro to locate five to six different positions which were available to Claimant as of October 25, 2002. She located four jobs which were hiring in October, and November, 2002, and one which was hiring in February, 2003. (Tr. 44-45).

Favaloro clarified she was only hired to conduct a labor market survey and find appropriate jobs for someone with Claimant's experience and capabilities; she was not asked to assist in re-implementing Claimant into the workforce. (Tr. 57). It would have been easier for her to do her job had she been able to meet with Claimant to find out what he likes and dislikes, as well as administer vocational aptitude tests.[8] If she had the opportunity to interview Claimant she may have been able to find additional, or different, appropriate jobs for him which potentially

[8] Ms. Favaloro testified when she interviews injured workers they are free to sit, stand or even recline on her office sofa; she accommodates just about any physical condition. (Tr. 80).

could pay higher wages. When she finally saw Claimant, he appeared to be an attractive applicant for most employers. (Tr. 80-82). Favaloro also testified a functional capacity evaluation is helpful in determining an individual's physical work restrictions and would be helpful in assessing Claimant's employability. (Tr. 85).

Favaloro testified her opinion was based on her review of the medical records provided to her. The only information available from Dr. Bernauer was his opinion that Claimant was "off work till next appointment." (Tr. 46, 49). When Favaloro rendered her July 9, 2003 report, she was not aware of Dr. Bernauer's current opinion regarding Claimant's condition. She relied on Dr. Perry's October 2002 reports, and his deposition testimony reviewing Claimant's abilities to return to work. Favaloro testified Dr. Perry restricted Claimant from lifting more than 20 pounds, performing overhead work and climbing vertical ladders. (Tr. 49-52). Favaloro did not know if Dr. Perry had reservations in assigning these restrictions 8 months after his October 2002 visit with Claimant, but she then noted Dr. Perry expressed a desire to re-examine Claimant. (Tr. 52-53). Favaloro also stated that here, because Claimant has two conflicting medical opinions, if he wanted to work she would attempt to solve the discrepancy in doctor opinions before beginning the job placement process. However, it is ultimately the injured worker's choice of which doctor opinion to go by and whether he wants to try working or not. (Tr. 96-97, 103).

Favaloro testified that when she surveys employers regarding job availability, she informs them of the restrictions placed on the worker by his or her doctors. Where multiple doctors give varying restrictions, she informs the employers of each restriction; however, she generally will not inform a potential employer that a doctor has deemed the worker temporary totally disabled. (Tr. 55-56). Favaloro testified it is not her policy to include employers and contact names in her survey report; therefore, labor market surveys are generally not helpful to the injured worker. Since Claimant applied for jobs she listed in her report, Favaloro opined he either guessed at the employer or joined a job service which provided him with employment opportunities. (Tr. 57-58).

Favaloro's Labor Market Survey listed several jobs, including one at a carwash. She testified Claimant could have expected to earn $35,000 in his first year, including base salary and commission; however, she does not know what the base salary is. The job description indicated Claimant would fill out a service form for people who drive up to the carwash. (Tr. 59-60). Favaloro testified this is an entry-level position which provides on-the-job training for basic computer skills;

she indicated the only skills the employer required of an applicant were a high school education and friendly demeanor. Favaloro testified if the weather is bad, the carwash closes. If they get busy, she did not know whether the service advisor was required to assist in washing the cars. She stated the carwash hired in February, 2003 and had a possible opening in July, 2003. (Tr. 61-63).

Favaloro also listed a position as a motor vehicle analyst. She indicated the employer could not tell her if they were hiring in October, 2002, but they did have a position opening in July, 2003. She found this job through Civil Service, and testified Claimant would have to take a diplomat test to be considered. She testified Claimant is no longer eligible to take this test because the eligibility requirements recently changed to include two years of clerical law enforcement or customer service experience; she does not believe Claimant has this experience. (Tr. 66-69, 72).

Favaloro listed a position as an Isle One Attendant, which involved a lot of work on a computer. The shuttle driver position also available at Isle One required a commercial driver's license, which they let applicants apply for at the same time they apply for the job; Favaloro stated Claimant did not have a CDL as of the time of his deposition. (Tr. 73-74). Additionally, the photo lab position Favaloro included in her report is an entry-level job which includes on-the-job training. The physical requirements were that "[o]nce a month, the worker received stock and may lift the chemicals that don't weigh more than 20 or 25 pounds. Most of the lifting is at 10 pounds." (Tr. 74-75). Favaloro also listed a position as an unarmed security guard which pays $5.50 to $8.00 per hour, depending on the location where he works. (Tr. 75).

Favaloro sent these job descriptions to Dr. Perry on July 7, 2003; he approved them on July 25, 2003. His opinions were solely based on his last visit with Claimant in October, 2002. (Tr. 75-76). Based on the jobs Dr. Perry approved, Favaloro testified Claimant is employable at between $5.50 per hour to $35,000 per year. However, not including the carwash or motor vehicle department positions, Claimant is employable at wages ranging from $5.50 to $8.00 per hour. (Tr. 77-79).

Favaloro was able to identify several positive traits of Claimant's which would be beneficial in his job search. His experience driving trucks within the Port of Lake Charles is valuable; although, if Claimant applied for his commercial driver's license, he would have more employment opportunities. Also, Claimant's skills repairing automobiles is useful. (Tr. 82-83, 104). The fact Claimant held a

job for a long period of time is attractive to employers, as are his high school education and experience as a foreman or supervisor. Specifically, supervisory experience indicates an ability to work well with others, and the fact Claimant has held various jobs at Employer's facility demonstrates his ability to adjust and learn new job requirements. (Tr. 88-90).

Favaloro testified she has had injured workers understate their qualifications and overstate their physical restrictions to potential employers. Specifically, she stated Claimant probably would not be hired for the service advisor position because he wrote on the application that he is temporarily totally disabled and could not start until he was released by his doctor. However, on cross examination, Favaloro stated this is proper information to disclose to an employer if Claimant in fact is not able to return to work yet. (Tr. 85-86, 94-95). Favaloro further testified if she had the opportunity to meet and interview Claimant, and if Claimant believed he could return to work, she would have been successful in placing him in employment. Favaloro testified if Claimant worked with her, he would be able to find employment at $26,000 per year or better, which is the equivalent of his pre-injury income. (Tr. 90-91).

D. Testimony of Steve Arceneaux

Arceneaux is the U.S. Gulf Regional Claims Director for P&O Ports; his job includes adjusting claims arising out of Lake Charles Stevedores' operations. Arceneaux testified the LS-202, which was prepared by his staff adjuster Christine Kelly, indicated Claimant chose his first treating physician; he stated Claimant executed a Choice of Physician form when he reported the accident. He testified Employer has a policy which requires employees to report any accidents immediately. In his fifteen and one-half years as a claims adjuster it was unusual for a worker to continue working without reporting an injury for two weeks. He has not seen workers try and work through an injury of the kind Claimant is alleging without at least reporting the accident. He testified it is common for a worker to wait until the next day to report an accident or injury, but he has never seen a worker wait two weeks. (Tr. 228-230, 239-242).

Arceneaux testified Employer has approved treatment by various doctors, including Dr. Bernauer and Dr. Gunderson, Claimant's former orthopedic doctor. He stated if Claimant had listed either of these doctors on his choice of physician form, it would have been approved. (Tr. 230). Arceneaux explained it is difficult to find good doctors in the Lake Charles area; there are a few general practitioners

and only four orthopedic offices which will see worker's compensation claimants. He stated Dr. Perry works in an office with 6 to 8 other orthopedic specialists; he considers them to be "middle-of-the-road" doctors that do not like to take worker's compensation cases. He testified it is difficult to get injured workers in to see Dr. Perry, and he is not sure how Dr. Nabours managed to do so.[9] (Tr. 230-231). Arceneaux testified there are only about 3 neurosurgeons in the Lake Charles area, and one refuses to see worker's compensation claimants. (Tr. 231-232). Up until the day of trial, Arceneaux had not seen a legible medical report from Dr. Bernauer's office. (Tr. 232).

On cross-examination, Arceneaux could not say if Employer used the Choice of Physician form before he started working there in May, 2002. Arceneaux also stated it is "absolutely unfair to say" Employer sends all injured workers to see Dr. Nabours. While some workers may agree to see Dr. Nabours, nobody is sent to any doctor.[10] Moreover, it is not a condition of their medical treatment that they see Dr. Nabours first. If a worker requests a different doctor, Employer will approve and authorize it, and has done so in the past. (Tr. 235-237). Arceneaux also testified that although Dr. Perry suggested Claimant should seek an opinion elsewhere, Employer did not authorize further medical treatment by either Dr. Bernauer or Dr. Odenheimer. (Tr. 237-240). On re-direct examination, Arceneaux clarified Dr. Perry stated that because he felt Claimant did not have a surgical condition and refused steroid injections, Claimant exhausted his abilities to make him better. Arceneaux interpreted this to mean Claimant was not cooperating with Dr. Perry's course of treatment and had no confidence in his recommendations. (Tr. 248-249).

As part of handling Claimant's claim, Arceneaux tried to get him to see a vocational rehabilitation specialist. However, Claimant rejected Employer's request and declined to participate in vocational rehabilitation efforts unless he was provided with a copy of all of Favaloro's records. Claimant also refused to undergo a functional capacity evaluation, despite the fact Employer informed him it would re-instate compensation after the labor market survey and FCE were complete. (Tr. 232-233, 247-248). Arceneaux took the average wage for the jobs identified in Favaloro's labor market survey and came up with a PPD rate based on

[9] I note, however, that Biven testified Dr. Nabours frequently refers injured workers to Dr. Perry, and Claimant saw Dr. Perry in 1999 for his right hand injury.

[10] This contradicts Biven's testimony that all injured workers are sent to Dr. Nabours, even if they choose a different doctor, and Manuel's testimony that Dr. Nabours is the "company doctor."

his pre-injury average weekly wage and sent Claimant a check. (Tr. 234). This is reflected in the supplemental check of $3,524.00 sent to Claimant. Arceneaux testified Employer paid Claimant PPD as of Dr. Perry's MMI date because the labor market survey indicated there was suitable alternative employment available. (Tr. 235).

On cross-examination, Arceneaux testified no benefits have been paid since October 17, 2002, except for the $3,524.00 PPD. He testified Employer began paying benefits after causation was established. (Tr. 242-243). Arceneaux acknowledged he received requests from Claimant to pay disability benefits and authorize medical treatment by Dr. Bernauer before Claimant actually saw Dr. Bernauer. (Tr. 244-246). He also testified Employer would be willing to re-instate compensation benefits if Claimant underwent an FCE. (Tr. 250).

E. Exhibits

(1) Deposition of Thomas W. Biven, Jr.

Biven testified by deposition on May 12, 2003. He has worked for Employer a total of 35 years. As Employer's office manager, Biven's duties include keeping billing records for receivables and payables, as well as preparing accident reports; he testified there are several other employees who also prepare accident reports. (CX-15, pp. 6-7, 12-13, 39). When an employee reports an accident or injury, a form is filled out and a drug test conducted by Dr. Nabours at the clinic, or the EDT at St. Patrick Hospital. Biven testified he only gets the injured worker to an available doctor; he does not make any decisions regarding medical treatment. *Id.* at 13-15. Dr. Nabours determines which specialists the injured worker may need to see. Biven was not sure if Employer had a list of recommended physicians; however, he testified Employer does not have a list of doctors it does not recommend. He testified injured workers have been referred to Dr. Nabours for more than ten years, possibly as long as twenty years. *Id.* at 15-17.

Dr. Nabours' name is not pre-printed on the authorization forms, but Employer does type his name on the form before the worker signs it. If a worker wants to see a doctor other than Dr. Nabours, he has to make the appointment himself. If so, the worker is not required to sign the form; Biven testified he does not tell injured workers this information. He does not explain the document to the injured workers, but lets them read it prior to signing; he assumes everyone knows

through their experience in the industry that they can choose their own doctor. On cross-examination, Biven testified he has had employees refuse to sign the choice of physician form and Employer still paid for their medical expenses. He also testified he tells the injured workers if they use a different doctor to just "let [him] know and [he'll] okay it." There is no form indicating Employer will pay for the worker's private physician because Biven has "no pull with any other doctor than Dr. Nabours"; thus the other doctors have to call to get verification the worker was injured on the job. However, all injured workers are required to see Dr. Nabours at some point, either before or after their appointment with their own physician. (CX-15, pp. 17-22, 28-30).

Employer recommends Dr. Nabours "because of the availability and the promptness of attention." He will see an injured worker within 2 to 3 hours, and communicates with Employer, making it easier for Employer to have contact with the injured worker. Biven testified it is difficult to even get an appointment with other doctors.[11] (CX-15, pp. 18-21, 34). On cross-examination, Biven testified Employer had tried recommending other doctors, but the relationship never worked out as well as with Dr. Nabours. Additionally, Dr. Nabours is one of the only doctors in Lake Charles who will get involved with workers' compensation claims. Employer has no control over which specialists Dr. Nabours refers injured workers to; Biven thought he used Dr. Perry and Dr. Raggio often because he had confidence in them and could get good reports out of them. *Id.* at 22, 36.

Biven testified he does not keep records of which injured workers are sent to Dr. Nabours; the only record he maintains is a short file of each worker's injuries, including when he went to the doctor and when he was released. However, he does not keep track of which doctors the injured workers see. On re-direct examination, he testified the short file includes the name of the doctor the worker is referred to. Biven guessed about 60% to 70% of injured workers see Dr. Nabours. (CX-15, pp. 24-25, 27, 39).

Biven testified he remembered Claimant reporting an injury in August, 2002, a couple of weeks after the accident occurred. Biven only briefly discussed the accident with Claimant. Cathy Manuel, the freight handling clerk, filled out the accident report; Biven did not handle any of the paperwork for Claimant's

[11] Biven explained many employees do not have accurate contact information, and if they go to the hospital or their own physician Employer may lose contact with that injured worker. Also, if a worker is injured on a Thursday he is sent to Urgent Care Clinic because Dr. Nabours is closed. (CX-15, p. 21, 27).

accident, and he did not discuss the Choice of Physician form with Claimant. On cross-examination, Biven testified this was not Claimant's first accident, and he had never complained about Dr. Nabours in the past. Since August, 2002, Biven has been contacting Claimant's doctors and turning information over to Arceneaux. (CX-15, pp. 30-31, 34-35).

(2) Deposition of Cathy Manuel

Manuel testified by deposition on May 12, 2003. She has been a data entry clerk at Employer for the past ten years. Her duties include filling out accident reports; she has prepared about 50 such reports in her time with Employer. Manuel testified she fills out an accident report, Choice of Physician, medical records authorization and drug test forms.[12] As she finishes each form, she hands it to the worker and tells him what it is. She testified most workers read the forms and sign them. (CX-16, pp. 5-6). Manuel stated she types in Dr. Nabours' name on the Choice of Physician form as she fills it out; it is not pre-printed. She testified Dr. Nabours is the company doctor; however, she does not know if workers are required to see him because she has never had a worker refuse his treatment.[13] If a worker ever refused to see Dr. Nabours she would refer him back to Biven; she has never explained to the workers they have a choice in which doctor they see, that Employer will pay for their choice of physician, or that they must fill out a Choice of Physician form to receive medical treatment. (CX-16, pp. 7-9).

Manuel testified she prepared Claimant's accident report. She also prepared the Choice of Physician form with Dr. Nabours' name on it and told Claimant "he needed to sign it." Claimant never indicated to her he did not want to see Dr. Nabours. After filling out the standard forms, she called the doctor's office to let them know Claimant was on his way. She turns all paperwork over to Biven and does not keep any copies. Manuel testified she does not recall seeing Claimant since filling out the forms. (CX-16, pp. 11-14).

[12] The Choice of Physician form is a company form that has been used ever since Manuel started working there. (CX-16, pp. 10-11).

[13] Manuel testified she is unaware of a list of doctors recommended by Employer; however, Employer does not have a list of doctors it does not recommend. (CX-16, p. 10).

(3) Medical Records of Carl W. Nabours, M.D.

Claimant presented to Dr. Nabours at the Lake Charles Medical and Surgical Clinic on August 23, 2002, with complaints of back, neck and shoulder pain, as well as right foot, thumb and forefinger pain. Claimant informed Dr. Nabours of his August 9, 2002 work injury, and said Ibuprofen did not help. X-rays showed satisfactory alignment of the lumbar spine, and mild scoliosis with convexity to the right in the thoracic spine. Dr. Nabours referred Claimant to Dr. Perry on August 26, 2002. (EX-2a, pp. 3, 6).

(4) Deposition and Medical Records of James D. Perry, M.D.

Dr. Perry, an orthopedic surgeon, testified by deposition on May 12, 2003; the parties stipulated to his expertise as an expert in the field of orthopedic surgery. He first treated Claimant for neck and shoulder pain on September 4, 2002.[14] Claimant informed Dr. Perry that he slipped and fell at work, and denied any past history of neck/back injury or pain. Claimant presented with pain in his neck, bilateral shoulders and right hand. A physical exam revealed pain in Claimant's range of motion and cervical spine in all planes. X-rays showed mild degenerative disk disease of the cervical spine; thoracic and lumbar findings were negative. (EX-2b, pp. 11, 13; EX-7, pp. 5-8). Dr. Perry diagnosed Claimant with cervical and lumbar strains. He recommended physical therapy and restricted Claimant to light duty work until September 19, 2002. *Id.* at 10, 14. On cross-examination, Dr. Perry testified he would not give the correlation between Claimant's work injury and cervical condition a high probability rating; however, there was no evidence the injury occurred elsewhere. (EX-7, p. 20).

Claimant returned to see Dr. Perry on September 19, 2002, with pain mostly in his neck; a physical examination was essentially the same, therefore Dr. Perry recommended a cervical MRI. (EX-2b, pp. 8-9; EX-7, p. 8). On September 30, 2002, Claimant presented to Dr. Perry with complaints of neck pain, scapular pain, numbness and tingling in the right index finger, but no right arm pain. His cervical MRI revealed disc desiccation at the C2-3, C3-4, C4-5 and C5-6 levels with a disc herniation at C5-6 right. The physical examination was not consistent with the abnormalities present in the MRI; however, on cross-examination, Dr. Perry stated

[14] Dr. Perry had seen Claimant earlier for a thumb injury; he performed an injection at that time. (EX-7, p. 6). He saw Claimant for the present injury a total of four times, including: September 4, 19 and 30, 2002; and October 17, 2002.

Claimant's complaints were consistent with the diagnostic studies. He diagnosed Claimant with degenerative disc disease, cervical herniated nucleus pulposus and a lumbar strain. Because Dr. Perry did not feel there was a cervical lesion at that time, he continued to recommend physical therapy and suggested steroid injections, which Claimant refused. He removed Claimant from work until October 17, 2002. (EX-2b, p. 5; EX-7, pp. 8-9, 16, 21, 32).

On October 17, 2002, Claimant presented to Dr. Perry with the same complaints. Although his condition was not improving, he continued to refuse steroid injections. As Claimant only had a mild degenerative disc disease and was only two months post-injury, Dr. Perry was not willing to operate. He testified steroid injections are standard, conservative treatment appropriate for Claimant's condition, and surgery would be a last resort. In refusing the injections, Claimant exhausted Dr. Perry's abilities to treat him; he suggested Claimant seek an opinion elsewhere. Dr. Perry also testified he felt Claimant was not cooperative with physical therapy. (EX-2b, pp. 3-4; EX-7, pp. 9-12).

On October 25, 2002, Dr. Perry sent a letter to Employer stating Claimant refused steroid injections, and he does not think Claimant is a surgical candidate. He declared Claimant to be at maximum medical improvement as of October 17, 2002. Dr. Perry classified Claimant as totally disabled, unable to return to Longshore work; at his deposition he testified Claimant may be capable of sedentary work and, if given the opportunity, would have restricted his lifting, climbing and overhead work. Dr. Perry testified Claimant may be able to work on the docks as a walking foreman or drive a forklift, but would not be able to climb ladders. He recommended a functional capacity evaluation, which is a useful way of determining a person's limitations to the extent they are consistent with the medical findings. (EX-2b, pp. 1-2; EX-7, pp. 13-15, 20, 24).

Prior to his deposition, Dr. Perry reviewed the December 17, 2002 EMG report, and a report of a January 14, 2003 MRI, which indicated an abnormality of the C6-7 area. Dr. Perry did not see the MRI films himself. As the September 28, 2002 MRI showed no such abnormality, Dr. Perry stated he would have concern about an intervening injury or other explanation why an additional disc would herniate. However, he also testified he would need to look at the film before forming the opinion it was the result of an intervening injury. (EX-7, pp. 15-17, 22). Dr. Perry could not say what his current restrictions on Claimant are, or if he is a surgical candidate, without re-examining Claimant. Dr. Perry has not seen Claimant since October 17, 2002. *Id.* at 17-18, 23.

(3) Records of Team Therapy Rehabilitation Services

Claimant was referred to Team Therapy, and Jeremy Stillwell for physical therapy sessions on September 4, 2002; he attended 20 sessions between September 5, 2002, and October 16, 2002. Claimant improved to performing ten minutes on the stationary bike and treadmill, and seven minutes on the upper body ergometer. However, he did not progress during the last two weeks, secondary to pain. Throughout the record, Stillwell indicated Claimant was motivated and willing to perform physical therapy exercises, even though he did have some skepticism and hesitation as to its effectiveness. At discharge, Claimant continued to complain of pain in the interscapular and lumbar regions. (EX-2c, pp. 1, 4, 5, 13, 16).

(4) Records of Christus St. Patrick Hospital, Renard C. Odenheimer, M.D., and R. Dale Bernauer, M.D.

Claimant was admitted to Christus St. Patrick Hospital's emergency department on October 27, 2002.[15] He was treated by Dr. Hathaway for complaints of pain and numbness to his head and neck. (CX-1, pp. 4, 11). Dr. Hathaway diagnosed Claimant with neck pain, prescribed anti-inflammatory pain medication and skeletal muscle relaxants, and discharged him home after four hours. He also referred Claimant to Dr. Odenheimer, a neurologist. *Id.* at 11, 13, 48.

Claimant presented to Dr. Odenheimer on October 30, 2002,[16] complaining of bilateral shoulder pain, which affected his right scapula, and mid and low back pain all stemming from an August 9, 2002 slip and fall work injury; the rest of Claimant's medical history was negative. Claimant also complained of headaches, sensory disturbance in his left face and neck, right upper quadrant pain, as well as right hand and foot pain. Dr. Odenheimer noted the MRI performed September 28, 2002, revealed spondylitic changes, disc disease and spinal stenosis. Physical and neurological examinations performed were largely insignificant. He diagnosed Claimant with cervical strain and disc disease, neck pain, headaches, bilateral shoulder pain, muscle spasm and back pain. (CX-3, pp. 19-20).

[15] Claimant paid for this medical treatment with his private health insurance. (CX-1, p. 4).

[16] Dr. Odenheimer saw Claimant a total of three times, including: October 30, 2002; November 26, 2002; and December 17, 2002.

Dr. Odenheimer suggested Claimant may need a referral to a neck surgeon. He discussed Claimant's return to Dr. Perry and concerns about steroid injections at length. *Id.* at 21. At Claimant's November 26, 2002 appointment with Dr. Odenheimer, he reported continued, significant neck and shoulder pain. Pain medication helped somewhat. Claimant's neurological exam was unchanged, and Dr. Odenheimer did not make any new recommendations. *Id.* at 18. Claimant followed-up on December 17, 2002, at which time Dr. Odenheimer performed an EMG of both of Claimant's upper extremities. He diagnosed Claimant with right C5, C6 radiculopathies, mild right carpal tunnel syndrome and left C5 radiculopathy. *Id.* at 26-27.

Claimant began treating with Dr. Bernauer, an orthopedic surgeon, on December 2, 2002.[17] On that date, he presented to Dr. Bernauer with constant moderate low back pain, severe neck pain, numbness and tingling of the right foot, pain between his shoulders, right arm pain, headaches, fatigue and difficulty sleeping. Claimant informed Dr. Bernauer of his August 9, 2002 slip and fall work injury. He also provided history of his prior work injuries, including a 1991 back injury which prevented him from working for three months and injuries to his right foot and right thumb. (CX-2, pp. 2-5, 24). A physical examination of Claimant on December 2, 2002, revealed decreased motion in the neck and back. X-rays showed narrowing at the C4-5 and C5-6, and the September 28, 2002 MRI showed disc herniations at C4-5 and C5-6. (CX-2, p. 24).

Dr. Bernauer ordered lumbar and thoracic MRIs because Claimant "had not had one done." The MRIs were conducted on January 14, 2003, and showed a disc bulge with slight lateral disc protrusion at L4-5, disc bulging to the right at L5-S1, as well as disc herniations at T5-6, C5-6 and C6-7. Dr. Bernauer recommended an anterior cervical diskectomy and fusion, which was not authorized by Claimant's case worker. (CX-2, p. 24).

Dr. Bernauer next saw Claimant on March 12, 2003. Claimant was improved, but complained of neck popping, headaches and left shoulder pain. Claimant returned for a follow-up exam on April 9, 2003. He continued to complain of neck pain as well as trigger points on the left shoulder and thoracic spine. Dr. Bernauer attempted to send Claimant to pain management, which was

[17] Dr. Bernauer saw Claimant a total of six times, including: December 2, 2002; January 15, 2003; March 12, 2003; April 9, 2003; May 14, 2003; and July 21, 2003. The records also indicate Claimant may have had an appointment on June 25, 2003, however it is unclear whether he actually attended this appointment. Additionally, Claimant had an appointment scheduled for August 27, 2003, after the hearing. (CX-2, pp. 36-41).

not authorized by his case worker. (CX-2, pp. 25, 31). Claimant continued to complain of neck and bilateral shoulder pain at his follow up visit on May 14, 2003. On July 21, 2003, he returned to Dr. Bernauer with thoracic back pain, although his neck had improved. Claimant still had not been to pain management. *Id.*

In a letter dated August 11, 2003, Dr. Bernauer opined Claimant's neck and back herniations have improved; however, Claimant's thoracic spine problem needs to be addressed with pain management. He indicated Claimant is totally disabled from any employment until he undergoes the recommended treatment. Additionally, Claimant is not able to undergo a FCE until he receives the recommended treatment. (CX-2, p. 25).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends Dr. Nabours and, subsequently, Dr. Perry were not his initial choices of physicians. He argues that although Dr. Nabours' name was printed on the Choice of Physician form which he signed, he was coerced into choosing Dr. Nabours as his doctor. Similarly, because Dr. Nabours referred him to Dr. Perry, Dr. Perry was also not his choice of doctor. Claimant submits Dr. Perry's October 25, 2002 letter to Employer, stating Claimant exhausted his abilities to treat him and suggesting Claimant seek an opinion elsewhere, constituted a refusal to treat by Employer. As such, Claimant is entitled to reimbursement for the treatment provided by Dr. Odenheimer and Dr. Bernauer. Furthermore, Claimant contends he is temporarily totally disabled, as he is unable to return to work and Dr. Bernauer continues to recommend treatment for his condition. Finally, Claimant asserts he acted reasonably in refusing to undergo a FCE or cooperate with Employer's vocational rehabilitation specialist. Claimant asserts his doctors did not release him to work, therefore he could not perform an FCE. Additionally, the vocational rehabilitation specialist was overly influenced by Employer and did not consider the opinions of Claimant's treating physician. Thus, his refusal to cooperate was reasonable.

Employer contends it is not liable for Claimant's treatment by Dr. Odenheimer or Dr. Bernauer. Claimant chose to be treated by Dr. Nabours and Dr.

Perry of his own free will, and Employer asserts it is not required to authorize a change in physicians, even if Claimant shows good cause for such a change. Additionally, Employer contends it is entitled to suspend compensation payments because Claimant refused to submit to medical treatment by Dr. Perry or undergo a FCE, and Dr. Bernauer failed to provide medical reports to it within 10 days of first treating Claimant. Employer also asserts Claimant is permanently partially disabled, based on Dr. Perry's opinion Claimant reached MMI on October 17, 2002, and the suitable alternative employment identified in the Labor Market Survey. Employer contends Claimant did not act diligently in locating employment and, therefore, Employer satisfied its burden in establishing suitable alternative employment and finding Claimant suffered no residual wage earning capacity.

B. Nature and Extent of Claimant's Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by the nature (permanent or temporary) and the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition. *Leech v. Service Engineering Co.*, 15 BRBS 18

(1982), or if his condition has stabilized. *Lusby v. Washington Metro. Area Transit Auth.*, 13 BRBS 446 (1981).

In the present case, Employer's reliance upon Dr. Perry's opinion that Claimant reached MMI on October 17, 2002, is shortsighted. On October 17, 2002, Dr. Perry reported Claimant refused steroid injections, thus exhausting Dr. Perry's abilities to make him better; he suggested Claimant seek an opinion elsewhere. Dr. Perry's letter of October 25, 2002, states that based on his inability to treat Claimant Employer can assume Claimant reached MMI as of October 17, 2002. However, Dr. Perry did not indicate Claimant's condition had stabilized or that further medical treatment is not necessary; only that he could not treat Claimant. Dr. Perry even suggested Claimant seek a second opinion, indicating he was in need of further treatment. Moreover, Claimant was admitted to the emergency room on October 27, 2002, just two days after he supposedly reached MMI, indicating his pain was getting worse. Dr. Odenheimer diagnosed Claimant with radiculopathy on December 17, 2002, and in January 2003 Dr. Bernauer discovered lumbar disc bulges and additional disc herniations at C6-7 and T5-6. Finally, Dr. Bernauer, Claimant's treating physician, opined that while Claimant's neck continues to improve, his thoracic spine needs to be treated with pain management. Thus, based on this medical evidence, I find Claimant has not yet reached maximum medical improvement. Therefore, I find he is temporarily disabled as of August 24, 2002 and continuing.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former Longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, it is undisputed that Claimant cannot return to his prior job as a longshoreman. Both Dr. Perry and Dr. Bernauer opined Claimant is unable to perform this work and is totally disabled due to his August 9, 2002 workplace injury. Therefore, I find Claimant has established a *prima facie* case of total disability.

C. Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

In the present case, Employer retained Nancy Favaloro on May 21, 2003, to conduct a labor market survey and determine Claimant's employability. In her survey, released July 9, 2003, Favaloro identified a variety of jobs available in October, and November, 2002 which she felt suitable for Claimant, including:

carwash service advisor; motor vehicle analyst; shuttle driver; attendant; security guard; and photo lab technician. She opined Claimant was employable at $5.50 per hour up to $35,000 per year. When she did not factor in the carwash or motor vehicle analyst positions, she opined Claimant could earn between $5.50 and $8.00 per hour. Based on this information, Employer determined Claimant had not suffered a loss in his pre-injury wage earning capacity of approximately $26,000 per year.

However, this Labor Market Survey was based on Dr. Perry's opinion Claimant reached MMI in October, 2002, and the work restrictions he placed on Claimant in June, 2003, eight months after he last saw Claimant. Dr. Perry expressed hesitation in assigning these restrictions, given this lapse in time. Employer and Favaloro did not consider Dr. Bernauer's opinions when exploring suitable alternative employment opportunities.[18] Although the jobs identified by Favaloro more or less fit within Dr. Perry's dated restrictions of light to sedentary work, lifting no more than 20 pounds, they do not fit within Dr. Bernauer's more current opinion that Claimant cannot perform any work at this time. As Dr. Bernauer is Claimant's current treating physician, has seen Claimant more recently and has the advantage of additional testing, I give more weight to his opinion than that of Dr. Perry who has not seen Claimant since October, 2002 and has not viewed the January 2003 MRI films. Furthermore, Dr. Bernauer's report is more consistent with his actual findings and Claimant's testimony. As Dr. Bernauer opined Claimant is unable to return to work, Employer is subsequently unable to establish suitable alternative employment. The jobs identified in Favaloro's Labor Market Survey are immaterial because it is Dr. Bernauer's opinion Claimant was unable to work at the time these employers were hiring; moreover, Dr. Perry did not release Claimant to work in October 2002. As such, I find Claimant is entitled to temporary total disability benefits as of August 24, 2002 and continuing.

D. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a).

[18] Although Employer did not have Dr. Bernauer's complete medical records on Claimant, it was aware he had not released Claimant to work; this should have given Employer enough notice to seek Dr. Bernauer's opinions on Claimant's precise restrictions before performing vocational rehabilitation services.

However, under § 7(d)(1), an employee is not entitled to reimbursement for medical treatment or services unless:

> (A) his employer refused or neglected to provide them and the employee has complied with subsections (b) and (c) and the applicable regulations, or
>
> (B) the nature of the injury required the treatment and services and, although his employer . . . knew of the injury, [it] neglected to provide or authorize them.

(1) Claimant's Choice of Physician under §§ 907(b)

When an employer learns of its employee's injury, it must authorize medical treatment from the employee's own choice of physician. 33 U.S.C. §§ 907(b), (c)(2). In determining whether a doctor is the employer's physician, and not the claimant's choice, "the relationship between the doctor and the employer must be such that it is reasonable to assume that the employer will adopt or has adopted the doctor's medical conclusions." *Slattery Assoc., Inc. v. Lloyd and Director, OWCP*, 725 F.2d 780, 785 (D.C. Cir. 1984).

In the present case, the issue is whether Dr. Nabours and Dr. Perry were Claimant's free choice of physician. There is evidence to support both sides of this argument. Claimant freely signed a Choice of Physician form, indicating Dr. Nabours as his choice of physician. Claimant testified he understood he could choose whichever doctor he wanted to see, and Employer had approved his choice of physician in the past. He had seen Dr. Nabours for other work injuries, and did not have any problems seeing him in this instance, either. Additionally, Claimant did not have a general practitioner and did know who he would list as his physician if Employer had not recommended Dr. Nabours. Arceneaux testified Employer does not "send" injured employees to any doctor, much less Dr. Nabours. Rather, Employer has always approved employee's choice of physician. This evidence supports Employer's argument that Dr. Nabours was Claimant's choice of physician.

However, Claimant, Biven and Manuel all testified Dr. Nabours' name was typed on the form by Employer. Claimant testified Biven's abrupt demeanor made him believe he had to sign the forms in order to get medical treatment, and Manuel testified she told Claimant he "needed to sign the form." Manuel also stated Dr. Nabours is Employer's "company doctor"; Biven corroborated this in his statement

that all injured employees must see Dr. Nabours, regardless of whether they choose him as their physician. Biven's testimony also indicated Employer has a close working relationship with Dr. Nabours in that the doctor will see injured workers within two or three hours, and keeps Employer updated on the workers' conditions. Employer has been referring injured workers to Dr. Nabours for almost twenty years. Because of this good working relationship and the shortage of doctors in the Lake Charles area, Dr. Nabours is the only doctor Employer recommends to its injured workers. All of this evidence supports Claimant's position that Dr. Nabours was not his free choice of physician.

I note that the testimonies of Arceneaux and Biven contradict each other on two key points. Arceneaux testified employees can list whichever doctor they want on the Choice of Physician form, but Biven testified if the employee does not choose Dr. Nabors he does not fill out the form at all. Arceneaux testified Employer does not send the employees to any doctor, but Biven testified all injured employees must see Dr. Nabours, supported by Manuel's statement Dr. Nabours is the company doctor. I note Arceneaux has been in Longshore for 15.5 years, but in his position as Employer's claims adjuster since only May, 2002, while Biven has been with Employer for 35 years. To the extent their testimony is contradictory; I give more weight to Biven's testimony in light of his history with Employer. Taking into consideration Employer's close relationship with Dr. Nabours, and the benevolent nature of the Act, I find Dr. Nabours was Employer's physician and not chosen by Claimant. As a natural extension of this relationship, I also find Dr. Perry was Employer's physician and not chosen by Claimant.

(2) Employer's Refusal to Provide Treatment

Once the employer has refused to provide treatment or to satisfy a claimant's request for treatment, the claimant need only establish that the unauthorized medical services were necessary and reasonable to treatment for his work injury in order to be compensable. *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984); *Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956, 958 (1982). When a treating physician selected by the employer declares the employee is recovered and discharged from treatment, it may be tantamount to the employer's refusing to provide treatment. *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1146 (1983)(finding a refusal to provide medical treatment on behalf of the employer when the employer's physician told the claimant that he had recovered from his injury and required no further treatment); *Atlantic Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971)(same). Subsequently, the

employee need only establish that further medical treatment was reasonable and necessary to obtain reimbursement from the employer. 33 U.S.C. § 907(d); *Rogers Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 692-93 (5th Cir. 1986).

In the present case, Dr. Perry's discharge of Claimant on October 25, 2002, was tantamount to a refusal to treat. Dr. Perry had seen Claimant on only four separate occasions. Claimant did not want steroid injections and Dr. Perry refused to perform surgery on him. According to Dr. Perry, there was nothing else he could offer Claimant and he suggested Claimant seek an opinion elsewhere. He did not invite Claimant to return if his condition worsened, which is particularly troubling in light of the fact he diagnosed a disc herniation only three weeks earlier, and such back injuries generally worsen over time. Dr. Perry did not even express a willingness to continue on with physical therapy, which Claimant was attending regularly.[19] According to him, his abilities to treat Claimant were exhausted. I find this abrupt discharge, with the suggestion that Claimant seek an opinion elsewhere, is tantamount to a refusal to treat. Claimant was not invited to return to Dr. Perry's office if his condition worsened, and indeed Claimant did not feel he could return to Dr. Perry, as evidenced by his visit to the emergency room ten days after his last visit.

As Dr. Perry is employer's physician, his refusal to care for Claimant constitutes a refusal by Employer to provide Claimant medical treatment and services. Accordingly, Claimant need not request authorization in order for further medical services for such to be compensable. However, the parties stipulated at the hearing that Claimant did request authorization to see Dr. Bernauer, and the record indicates he also requested authorization to see Dr. Odenheimer. Thus, Employer refused Claimant medical treatment on two different occasions: when Dr. Perry refused to treat him and when it denied Claimant's requests for authorization. As such, I find Claimant is entitled to reimbursement for the costs of any reasonable and necessary medical treatment after October 25, 2002.

[19] Dr. Perry testified he thought Claimant was resistant to physical therapy. (See EX 7, pp. 11-12). However, the records from Jeremy Stillwell, Claimant's physical therapist, indicate Claimant was motivated in physical therapy, was willing to perform therapeutic exercises, attended all 20 of his appointments between September 5, 2002 and October 16, 2002, and made some progress in his abilities during this time. While there are two notes in the forty-four pages of records reflecting Claimant's skepticism and hesitation, at no time does Stillwell indicate Claimant was uncooperative or unwilling to submit to physical therapy. The record shows no basis for Dr. Perry's statement.

(3) Consent to Change Physicians under § 907(c)(2)

When a claimant chooses his initial physician and then wishes to change treating physicians, he must first request consent for a change. Consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a); *Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992)(Smith, J., dissenting on other grounds); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent upon a showing of good cause for change; however, the employer has no obligation to approve a change, even upon a showing of good cause. 33 U.S.C. 907(c)(2).

Here, because I have already established that Claimant did not choose to see Dr. Nabours or Dr. Perry, Employer's consent for Claimant to change his treating physician to Dr. Bernauer is not an issue. However, assuming *arguendo* that Dr. Perry was Claimant's initial choice of physician it would follow that Claimant must comply with § 7(c)(2) in order to be entitled to reimbursement for medical treatment provided by Dr. Odenheimer and Dr. Bernauer. Of particular importance to this issue is Dr. Perry's discharge of Claimant on October 25, 2002. It is reasonable to conclude that because Dr. Perry refused to treat Claimant, Claimant was without a treating physician as of October 25, 2002. (*See discussion, supra*). "Change" is defined, in pertinent part, as "to exchange for or replace by another; to lay aside, abandon, or leave for another." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 248 (1984). Thus, as of October 25, 2002, Claimant could not change physicians because he had no physician which to replace, exchange, abandon or leave for another. It is not within the spirit of the Act to leave a claimant without a treating physician in the hands of a reluctant employer. To require Claimant to abide by § 7(c)(2) in this instance would render him without any medical treatment for his work injury because Dr. Perry refuses to treat him and Employer is under no obligation to authorize a change in physicians.

In this situation, it is appropriate to turn to § 7(d)(1)(B) which allows reimbursement for treatment required by the injury which Employer failed to authorize. In *Jackson v. Navy Exchange Service Center*, the claimant's initial choice of physician misdiagnosed her condition, which the ALJ held was tantamount to a refusal to provide treatment. 9 BRBS 437, 439(1978). The claimant then sought treatment from another doctor, but failed to request prior authorization from the employer. *Id.* at 438. The Board analyzed the claim under

§ 7(d)(1)(B) and denied medical expenses on the ground that because Claimant failed to request authorization, Employer was never given the opportunity to deny said authorization. *Id.* at 439. From this rationale, it may be inferred that if the claimant had requested authorization for further treatment, she would have been entitled to reimbursement. When the employer refuses to authorize medical treatment upon request and the claimant thereafter procures necessary medical treatment, the employer must bear those expenses. *Shahady,* 13 BRBS at 1009; 33 U.S.C. § 7(d). However, the requirement to request authorization for medical treatment does not apply in emergency situations; an employer is liable for any emergency medical treatment rendered for a work-related injury. 20 C.F.R. § 702.421; *Jackson*, 9 BRBS at 439.

In the present case, after Dr. Perry discharged him from his care, Claimant was admitted to Christus St. Patrick Hospital's emergency department. Pursuant to 20 C.F.R. § 702.421, Employer shall bear responsibility for these expenses. Claimant repeatedly requested authorization from Employer to see both Dr. Odenheimer and Dr. Bernauer; he was denied each time. Thus, as Employer denied Claimant's requests for treatment, I find Claimant is entitled to reimbursement for any reasonable and necessary medical treatment provided by Dr. Odenheimer and Dr. Bernauer.

(4) Reasonable and Necessary Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920; *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

(a) Establishing a *Prima Facie* Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v.*

Kaiser Shipyards, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Dr. Odenheimer, a neurosurgeon, examined Claimant on three different occasions and performed EMGs of his upper extremities, revealing bi-lateral radiculopathy and carpel tunnel syndrome. Given Claimant's history of complaints of back, shoulder and neck pain, I find the EMGs necessary and reasonable to confirm the existence of the radiculopathy. Dr. Bernauer, an orthopedic surgeon and Claimant's treating physician, saw Claimant a total of 6 times as of the date of hearing. He ordered MRIs of Claimant's lumbar and thoracic spine, revealing two lumbar disc bulges and three disc herniations in the thoracic and cervical spine. He recommended that Claimant have an anterior cervical diskectomy and fusion. At the hearing Claimant testified he and Dr. Bernauer decided to try pain management before surgery, as Claimant was skeptical about the surgery. He clarified he testified at his deposition that he may seek a second opinion about having the surgery only because he was trying to cooperate with Employer. Dr. Bernauer also recommended pain management for Claimant's thoracic back condition. Neither the surgery or pain management has been approved by Employer. (Tr. 127-129; CX 2, p. 24). Thus, one of Claimant's treating physicians recommended a specific procedure for recovery from a workplace accident and Claimant is willing to undergo that treatment, which establishes a *prima facie* case that the treatment is both reasonable and necessary.

(b) Rebuttal of the Presumption

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related"). Here, however, Employer presented no evidence that the treatment provided by Dr. Odenheimer and recommended by Dr. Bernauer is not reasonable or necessary. Employer did raise the argument that there must be an intervening injury which would cause additional discs in Claimant's back to herniate; thus his current condition is not related to his work injury. Dr. Perry reviewed Claimant's September 28 MRI and found he had a herniated disc at C5-6. Dr. Bernauer reviewed the very same MRI and found herniations at C5-6 and C4-5. The January 14 MRI revealed herniations at T5-6 and C6-7; however, Employer merely speculates that these additional herniations were caused by an intervening injury,

and were not the natural result of Claimant's work injury. It put forth no substantial evidence to support its position. As such, they have failed to rebut Claimant's *prima facie* case that the treatment is necessary and reasonable to the care of his work-related injury. Therefore, I find Claimant is entitled to reimbursement for treatment provided by Drs. Odenheimer and Bernauer.

(5) Claimant's Refusal to Submit to Treatment

Employer also asserts that it is entitled to suspend medical benefits because Claimant refused to submit to Dr. Perry's recommended treatment of steroid injections and would not undergo a functional capacity evaluation.

> Section 7(d) reads in pertinent part: "If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal."

Hrycyk, v. Bath Iron Works Corp., 11 BRBS 238, 240 (1979)(emphasis in original). The unreasonable inquiry is an objective one. First, it must be established that "the recommended procedure . . . [is] likely, as a matter of reasonable medical probability, to be of aid to a course of treatment designed to relieve the claimant's symptoms and restore a degree of his . . . lost earning capacity without undue risk to his . . . health or well-being." *Id.* at 241. If this is found, the claimant's refusal is unreasonable only if the ordinary reasonable person would refuse such treatment. *Id.* The employer must carry the burden of proving the claimant's refusal to submit to treatment is unreasonable before the subjective issue of whether circumstances exist to justify the refusal can be considered. *Id.* at 242-43.

In the present case, Claimant has refused Dr. Perry's recommended steroid injections into his back and neck. Before analyzing the reasonableness of this refusal, I note that steroid injections are merely a temporary treatment to ease a person's pain. They are not proven to permanently relieve pain associated with a work injury, nor does Dr. Perry guarantee the injections will actually improve Claimant's condition. That said, Employer does not present an argument that Claimant's refusal of steroid injections is objectively unreasonable. Employer emphasizes Dr. Perry's testimony that steroid injections are standard and

appropriate treatment for Claimant's condition; however, Employer does not address the ordinary reasonable person test. I find an ordinary and reasonable person would express hesitation in receiving steroid injections in his neck and back and wish to explore other treatment options first. Steroid injections result in some unpleasant side effects and do not necessarily improve a person's pain. As Employer has failed to carry its burden of proving Claimant's refusal to receive steroid injections is objectively unreasonable, I find Employer is not entitled to suspend Claimant's compensation benefits on that basis.

Even if Employer had carried its burden in establishing Claimant's refusal was objectively unreasonable, the circumstances surrounding his refusal justify his actions. This analysis is subjective, focusing on Claimant's personal reasons for refusing the steroid injections; as such, there may be thousands of reasons why Claimant refused the recommended treatment. *Hrycyk,* 9 BRBS at 241. Employer alludes to the fact that there must be extenuating circumstances which establish a compelling reason for Claimant's refusal; this is not an appropriate standard. The "particular circumstances [need only] provide sufficient justification" for Claimant's refusal. *Id.* Claimant asserts he refused the treatment because he did not like taking steroids and similar injections only temporarily helped his foot and hand injuries; he also did not like the side effects which accompanied these injections. Claimant testified another reason he refused the injections was because he did not like needles, even though he had been persuaded to have other injections in the past. I find these reasons constitute sufficient justification for his refusal. Additionally, Claimant's past injections were not very helpful, and a prior unsuccessful treatment has been recognized as sufficient justification for refusing the same treatment again. See *Hrycyk* 11 BRBS at 241. As such, I find Claimant's personal reasons set forth in his testimony sufficiently justify his refusal of the injections and Employer is not entitled to suspend compensation payments.

Employer also asserts Claimant's refusal to undergo a functional capacity examination is unreasonable and a sufficient basis to suspend compensation. Employer correctly points out that § 7(d) of the Act requires Claimant to submit to medical examination by Employer's physician. However, the Benefits Review Board has held that § 7(d) and the corresponding regulations do not extend to non-medical vocational rehabilitation evaluations. *Simpson v. Seatrain Terminal of Calif.*, 15 BRBS 187, 190-91 (1982). Functional capacity evaluations are generally performed by rehabilitation specialists, not medical doctors, and Employer has not argued otherwise in this case. Furthermore, Claimant's treating doctor is of the opinion that Claimant is unable to undergo a FCE at this time. I also note FCE's can be physically exhausting and a strenuous effort, sometimes worsening a

person's physical condition in the process. As such, Claimant's refusal is hardly unreasonable and, nevertheless, his refusal to undergo a FCE cannot be a basis for suspending compensation.

(6) Failure to Provide Medical Records

Employer also asserts it is entitled to suspend Claimant's medical benefits because it has not received timely medical reports from Dr. Bernauer. Under § 7(d), a claimant's treating physician must provide the Employer and the Secretary with a report of the injury and treatment within ten days following the first treatment. The Board has held that § 920 of the Act creates a presumption in favor of an employee that his claim comes within the provisions of the Act and that sufficient notice of the claim was given; however, § 920 does not relieve the claimant of his burden of proving the elements of his claim. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 10 BRBS 1, 5, 8 (CRT)(4th Cir. 1979). An employer has not suffered any prejudice where it is "aware of the injury from the outset and received actual knowledge of the treatment before the report was received." *Roger's Terminal*, 784 F.2d at 694. The ALJ, moreover, may excuse the failure to furnish medical reports when necessary "in the interest of justice." *Id.*; 20 C.F.R. § 702.422.

Here, Employer claims in its post-hearing brief that it did not receive a single medical report from Dr. Bernauer until the day before the hearing. At the hearing, however, Employer's counsel stated it had not received any reports of substantive medical treatment since January, 2003. Employer had received Claimant's numerous requests for authorization to be treated by Dr. Odenheimer and Dr. Bernauer, results of the December, 2002, EMG and the January, 2003, MRI, as well as Dr. Bernauer's notes excusing Claimant from work. Although Employer did not have reports of Dr. Bernauer's medical conclusions and opinions after January, 2003, I find they were provided with sufficient notice of Claimant's treatment with Dr. Bernauer and the requested medical services he was seeking. As such, Employer was far from prejudiced in this matter and it would be unfair to allow Employer to escape liability on the technicality of failing to provide complete medical reports. Therefore, I find it within the purview of my discretion as an Administrative Law Judge to excuse Dr. Bernauer's failure to provide Employer with medical reports within 10 days of treatment, and Employer is not entitled to rely upon this argument as a basis for refusing compensation.

(7) Conclusion

In conclusion, I find Claimant is entitled to medical benefits for the treatment and services provided by Dr. Odenheimer and Dr. Bernauer. Claimant was refused treatment by Employer's physician, Dr. Perry, thus excusing his failure to obtain authorization to seek treatment elsewhere. In the alternative, even if Dr. Perry was Claimant's choice of physician, his refusal to treat did not place Claimant's fate in the hands of Employer, who is not required to authorize a change of physician. On the other hand, Dr. Perry's refusal left Claimant without a treating physician which required him to request authorization for treatment by another physician. As such, Claimant is entitled, under § 7(d), to reimbursement for any unauthorized reasonable and necessary treatment subsequently procured. As the treatment provided by Dr. Odenheimer and Dr. Bernauer is reasonable and necessary to Claimant's care, he is entitled to reimbursement for said treatment.

Moreover, Employer is not entitled to suspend Claimant's compensation for failure to submit to treatment and provide medical records within ten days of treatment. Claimant's refusal to submit to the steroid injections was reasonable, and his refusal to undergo a FCE was not only reasonable, but did not constitute a basis on which Employer could suspend compensation. Additionally, in light of Employer's actual knowledge of Claimant's injury and treatment sought from Dr. Bernauer, I have excused his failure to provide Employer with complete medical records. Therefore, Claimant is entitled to compensation for the medical expenses related to treatment from Drs. Odenheimer and Bernauer, as established by § 7 of the Act.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per

cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Co., et. al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since a proper application for fees has not been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 23, 2002, to present and continuing based on a stipulated average weekly wage of $573.38.

2. Employer shall be entitled to a credit for the temporary total and permanent partial disability compensation paid to Claimant under Sections 908(b) and (c)(21) of the Act.

3. Employer shall reimburse Claimant for all medical expenses incurred after October 25, 2002, and pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Employer shall pay Claimant interest on accrued unpaid compensation

benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE